OAH Docket No. 15-1007-17009-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF BARBER AND COSMETOLOGIST EXAMINERS

In the Matter of Proposed Amendments to Permanent Rules Governing Hair Braiding, Minnesota Rules, Chapters 2100, 2105, and 2110.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Beverly Jones Heydinger held a hearing concerning the above rules on February 28, 2006, at 9:00 a.m. in Conference Room A, Fourth Floor, 2829 University Avenue SE, Minneapolis, Minnesota. The hearing continued until everyone present had an opportunity to state his or her views on the proposed rules.

The hearing and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.[1] The legislature has designed the rulemaking process to ensure that state agencies have met all the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are necessary and reasonable and that any modifications that the agency made after the proposed rules were initially published do not result in their being substantially different from what the agency originally proposed. The rulemaking process also includes a hearing when a sufficient number of persons request one. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

The agency hearing panel, consisting of Board of Barber and Cosmetologist Examiners ("Board" or "Agency") members Susan Schaefer, Kenneth Kirkpatrick, and Robert Salmonson; and Michele M. Owen, Assistant Attorney General, were available to provide the public with information about the proposed rules and to answer any questions. Approximately 72 members of the public attended the hearing and signed the hearing register.

After the hearing ended, the record remained open for five business days, until March 7, 2006, to allow interested persons and the Agency an opportunity to submit written comments. Following the initial comment period, the record remained open for an additional five business days to allow the Agency the opportunity to file a written rebuttal to the one comment submitted. The deadline for responses to the comments was March 14, 2006. One responsive comment was received in addition to the Agency's response. The hearing record closed for all purposes on March 14, 2006.

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[1] Minn. Stat. §§ 14.131 through 14.20. (Unless otherwise specified, all references to Minnesota Statutes are to the 2004 edition, and all references to Minnesota Rules are to the 2005 edition.)

NOTICE

The Commissioner must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

If the Board makes any changes to the rules as proposed, whether or not those changes have been approved or recommended by this Administrative Law Judge, it must resubmit the rules to the Chief Administrative Law Judge for a review of those changes.

After the rules have been adopted, the Office of Administrative Hearings will request certified copies of the rules from the Revisor and file the rules with the Secretary of State. The Agency must give notice of the rules' filing to all persons who requested that they be informed.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On October 31, 2005, the Board published a Request for Comments in the *State Register* on planned rule amendments modifying the definitions of barbering and cosmetology to exclude hair braiding, hair braiding services, and hair braiders.[2] The request indicated that the Board was engaged in rulemaking on this topic.

2. As required by Minn. Stat. § 14.131, the Board, by letter dated November 17, 2005, asked the Commissioner of Finance to evaluate the fiscal impact and benefits of the proposed rules upon local units of government. By letter dated November 22, 2005, the Commissioner of Finance concluded that the rules would have little fiscal impact on local units of government.[3]

3. On December 12, 2005, the Agency filed copies of the proposed Dual Notice of Intent to Adopt Rules, proposed rules, and draft Statement of Need and Reasonableness with the Office of Administrative Hearings. The filings complied with Minn. R. 1400.2080, subp. 5. On the same date, the Agency also filed a proposed additional notice plan for its Dual Notice and requested that the plan be approved pursuant to Minn. R. 1400.2060. By letter dated December 16, 2005, Administrative Law Judge Beverly Jones Heydinger approved the additional notice plan.

4. On January 6, 2006, the Board mailed the Dual Notice of Intent to Adopt Rules to all persons and associations included in the Board's rulemaking mailing list and

[2] Exhibit ("Ex.") A (30 S.R. 449 (October 31, 2005)).
[3] Ex. C, p. 8.

additional notice plan.[4] The Dual Notice contained the elements required by Minn. R. 1400.2080, subp. 2. Requests for a hearing had to be received by February 16, 2006. If the required 25 requests for hearing were received, a hearing would be held February 28, 2006, in St. Paul. The Dual Notice also announced that the hearing would continue until all interested persons had been heard.

5. On February 21, 2006, upon receiving more than 25 requests for a hearing, the Board mailed a Notice of Hearing to all persons who had requested a hearing, as well as to all persons who had submitted comments regarding the proposed rules.[5]

6. At the hearing on February 28, 2006, the Board filed the following documents as required by Minn. R. 1400.2220:

A. The Board's Request for Comments as published in the *State Register* on October 31, 2005.[6]

B. The proposed rules dated November 7, 2005, including the Revisor's approval;[7]

C. The Statement of Need and Reasonableness ("SONAR");[8]

D. The Dual Notice of Hearing as mailed and published in the *State Register* on January 17, 2006;[9]

E. Certificate of Mailing the Dual Notice and Certificate of Mailing List;[10]

F. Certificate of Giving Additional Notice;[11]

G. The certification that the Board mailed a copy of the SONAR to the Legislative Reference Library;[12]

H. Written comments and requests for hearing received by the Board in response to the Dual Notice;[13]

I. A copy of the transmittal letters sending a copy of the SONAR and other documents to Legislators on January 6, 2006;[14]

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[4] Ex. E.
[5] Ex. L.
[6] Ex. A.
[7] Ex. B.
[8] Ex. C.
[9] Ex. D (30 S.R. 785 (January 17, 2006)).
[10] Ex. E.
[11] Ex. F.
[12] Ex. G.
[13] Ex. H.

J. A copy of the Stipulated Findings of Fact, Conclusions of Law and Agreed Order in *Anderson et al v. Board of Barber and Cosmetologist Examiners et al*, Court File No. 05-5467, Hennepin County District Court, June 10, 2005 (Honorable Isabel Gomez);[15]

K. A copy of *Cornwell v. Hamilton*, 80 F.Supp.2d 1101 (S.D. Cal. 1999);[16] and

L. Certificate of mailing the notice to those persons who requested a hearing, and the notice of hearing to those who requested a hearing, both dated February 21, 2006.[17]

7. The Administrative Law Judge finds that the Board has met all of the procedural requirements under the applicable statutes and rules.

Background and Nature of the Proposed Rules

8. The Board was created by the Minnesota Legislature in 2004, supplemented by further legislation in 2005. The jurisdiction of the Board combines the authority and functions of the former Board of Barber Examiners, which licensed and regulated the practice of barbers, barber shops, and barber schools under Minnesota Statutes, chapter 154, and the authority and functions formerly exercised by the Minnesota Commissioner of Commerce, who administered and enforced the laws regulating cosmetologists, cosmetology salons, and cosmetology schools under Minnesota Statutes, chapter 155A. Operation of the Board staff, administrative services and office space, the review and processing of complaints, the setting of Board fees, and other aspects of the Board's operations are governed by Minnesota Statutes, chapter 214.

9. Prior to the proposal of these rules, hair braiders and hair braiding establishments were regulated by the Board and the Commissioner of Commerce. In April, 2005, three hair braiders residing and working in Minnesota brought a civil suit in Hennepin County District Court against the Board and the Commissioner of Commerce to determine whether it is unconstitutional under the Minnesota and United States Constitutions, as well as contrary to federal law and Minnesota public policy, to interpret Minnesota Statutes, chapter 155A and Minnesota Rules, chapter 2642 (the Minnesota cosmetology regulations) as applying to hair braiding, hair braiders, and hair braiding services.[18]

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[14] Ex. I.
[15] Ex. J.
[16] Ex. K.
[17] Ex. L.
[18] Ex. J, *Anderson et al. v. Minnesota Board of Barber and Cosmetologist Examiners et al*., Court File No. 05-5467, Hennepin County District Court, June 10, 2005 (Honorable Isabel Gomez).

10. The issues in the lawsuit were virtually identical to the issues presented in a California case decided in 1999.[19] In the *Cornwell* case, hair braiders associated with the American Hairbraiders and Natural Hair Care Association brought suit against the California Department of Consumer Affairs alleging that the state cosmetology licensing requirements for hair braiders violated the due process, equal protection, and privileges and immunities clauses of both the U.S. and California Constitutions. The court granted summary judgment for the Plaintiff hair braiders and held, using the rational basis test, that the requirements for cosmetology licensure in California were not rationally related to the State's objective of protecting public health and safety when applied to hair braiders, whose activities involved only a small overlap with subjects covered by cosmetology regulations. In other words, the state cosmetology regulations did violate the due process and equal protection rights of individuals whose activities were confined to braiding of African hair.[20]

11. The parties reached a stipulated agreement to resolve the case, documented in a Hennepin County District Court Order dated June 10, 2005.[21] One of the stipulated findings of fact stated that hair braiders and hair braiding establishments agreed to refrain from the use of any device, method or technique that could result in significant injury to the customer. The Plaintiff hair braiders also agreed to practice ordinary personal hygiene, disinfect their implements, towels, headrests and treatment tables, and to refuse to perform braiding services to customers suffering from parasites, scalp sores or infections.[22] The Board has not proposed in these rule amendments that these restrictions be imposed on all hair braiders.

12. Another of the stipulated findings of fact discussed that Minnesota statutes and rules have the effect of driving hair braiding services "underground." And while this "underground economy" is an "open secret," it is necessary to mainstream the business so that it can expand and flourish.[23] To that end, the Board is required to initiate this rulemaking, as described in the following paragraph, and to work in good faith towards adoption of the rule amendments by April 20, 2006.[24]

13. The proposed rule amendments govern the definitions of barbering and cosmetology and the cosmetology educational curriculum. The proposed amendments would:

> Modify the definitions of barbering and cosmetology to exclude hair braiding, hair braiding services, and hair braiders;

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[19] Ex. K, *Cornwell et al. v. Hamilton et al.*, 80 F.Supp.2d 1101 (S.D. Cal. 1999).

[20] The court specifically did not address the issues of "whether California can require licenses for hairbraiders or whether they can require schooling and a licensing examination prior to allowing African hair stylists to perform their craft." *Cornwell*, 80 F.Supp.2d at 1104. The court stressed that it is the role of the legislature, and not the courts, to write laws and mandate new regulatory programs to be enforced by state agencies.

[21] Ex. J.

[22] Ex. J, p. 3.

[23] Ex. J, p. 7.

[24] Ex. J, p. 17.

Preempt ordinances by local units of government that prohibit hair braiding, hair braiding services, or hair braiders, or regulate any matter relating to licensing, testing, or training of hair braiding, hair braiding services, or hair braiders; and

Modify the educational requirements for cosmetology students to allow for a maximum of one percent of the total curriculum time in cosmetology schools to be dedicated to the teaching of unregulated services.

14. Until the Court Order and the subsequent proposal of these rule amendments, the statutes and rules governing "cosmetology" and "licensed services" were interpreted by the Commissioner of Commerce to include hair braiding, hair braiding services, and hair braiders. Accordingly, the curricula offered by Minnesota cosmetology schools often included some instruction in hair braiding skills, and instruction in that skill counted toward fulfillment of some of the required types and hours of instruction for a cosmetology student.

15. The proposed amendments are the Board's good faith effort toward adoption of the rule amendments by April 20, 2006. Adoption of the first two categories of rule amendments would shift hair braiding from a "licensed service" to an "unregulated service," as hair braiding would no longer fall within the definition of "cosmetology" in the Board's statutes and rules. But cosmetology schools and associations have expressed to the Board a desire to continue instruction in hair braiding that would provide some measure of academic credit for students. The third category of rule amendment responds to that need by modifying the educational curriculum for cosmetology students to allow for a maximum of one percent of the total curriculum time to be dedicated to the teaching of unregulated services.[25]

Statutory Authority

16. Minnesota Statutes, section 154.22(f) dictates that the barber members of the Board shall oversee administration, enforcement, and regulation of, and adoption of rules under sections 154.01 to 154.26, and that the cosmetologist members of the Board shall oversee the same duties under sections 155A.01 to 155A.16. Further, Minnesota Statutes, sections 154.24 and 155A.05 give the Board authority to make reasonable rules, according to Chapter 14, for the administration of the provisions of sections 154.01 to 154.26 and 155A.01 to 155A.16.

17. The Administrative Law Judge finds that the Board has the statutory authority to adopt the proposed rules and rule amendments.

[25] Other examples of unregulated services include ear piercing, body wrapping, permanent depilation, tattooing, artificial tanning of the skin, personal services incidental to performance in theatrical or musical productions or media appearances, personal services incident to mortuary practice, and massage services.

Rulemaking Legal Standards

18. Under Minnesota law,[26] one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rules by an affirmative presentation of facts. In support of a rule, an agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[27] The Board prepared a Statement of Need and Reasonableness (SONAR)[28] in support of its proposed rules. At the hearing, the Board relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Agency staff at the public hearing, and by the Agency written post-hearing comments and reply.

19. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[29] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[30] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[31] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[32]

20. Reasonable minds might be divided about the wisdom of a certain course of action. An agency is legally entitled to make choices between possible approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative presents the "best" approach, since this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.[33]

21. In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether an agency has statutory authority to adopt the

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[26] Minn. Stat. § 14.14, subd. 2; Minn. R. 1400.2100.

[27] *Mammenga v. DNR of Human Services*, 442 N.W.2d 786 (Minn. 1989); *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).

[28] Ex. C.

[29] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 43 N.W.2d 281, 284 (1950).

[30] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).

[31] *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).

[32] *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d at 244.

[33] *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

rule, whether the rule is unconstitutional or otherwise illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule.[34]

22. Minnesota law allows an agency to withdraw a proposed rule, or a portion of a rule, at any time prior to filing it with the Secretary of State,[35] "unless the withdrawal of a rule or a portion of the rule makes the remaining rules substantially different."[36]

23. The standards to determine whether changes to proposed published rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if "the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice," the differences "are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice," and the notice of hearing "provided fair warning that the outcome of that rulemaking proceeding could be the rule in question." In determining whether modifications to initially published proposals are substantially different, the administrative law judge is to consider whether "persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests," whether the "subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing," and whether "the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing."

Additional Notice Requirements

24. Minn. Stat. § 14.131 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule or explain why these efforts were not made. The Board made appropriate efforts to inform and involve interested and affected parties in this rulemaking. The following individuals and groups received notice of the proposed rule amendments from the Board:

a. All persons on the Board's current mailing list to receive advance notice of all Board meetings;

b. The barbering and cosmetology trade associations in Minnesota;

c. All licensed cosmetology schools in Minnesota;

d. The attorneys representing the plaintiffs in the *Anderson et al. v. Minnesota Board of Barber and Cosmetologist Examiners et al.;*

[34] Minn. R. 1400.2100.
[35] Minn. Stat. § 14.05, subd. 3.
[36] Minn. R. 1400.2240, subp. 8.

e. The Minnesota Commissioner of Commerce, who was also a defendant in the *Anderson* case;

f. The Minneapolis Star Tribune and the St. Paul Pioneer Press; and

g. The Board's website contained a posting of the Dual Notice.

25. The Administrative Law Judge finds that the Board fulfilled its additional notice requirement.

Statutory Requirements for the SONAR

Cost and Alternative Assessments in the SONAR:

26. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

(1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

(2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;

(3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;

(4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;

(5) the probable costs of complying with the proposed rule, including the portion of total costs that will be borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;

(6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and

(7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

27. Those who will be primarily affected by the proposed rule amendments are hair braiders, hair braiding establishments, cosmetology students, cosmetology schools, cosmetologists, and local units of government.[37] The Board argues that hair braiders would benefit because they would no longer be required to complete the

[37] SONAR, p. 5.

extensive cosmetology educational curriculum to become licensed as cosmetologists. The Board argues that hair braiding establishments would benefit because they would no longer have to be licensed as cosmetology salons and managed by a licensed cosmetologist. As for cosmetology schools and students, the Board suggests that they would benefit from compliance with the Court Order, but still continue to provide and receive credit for instruction in "unregulated services." The Board argues that licensed cosmetologists would benefit because the rule amendments modify Minnesota law to remove the constitutional issues created by application of cosmetology laws to hair braiders and hair braiding establishments, yet still allow licensed cosmetologists to provide hair braiding services to the public as part of their businesses. Finally, the Board asserts that local units of government would be affected because the proposed rules preempt them from imposing the same types of licensing and training requirements on hair braiders or hair braiding establishments that the Board seeks to eliminate.

28. With regard to the second factor, the Agency anticipates that the only costs it will incur will be legal and publication expenses related to this rulemaking proceeding. The Agency anticipates no effect on state revenues.[38]

29. As to the third and fourth factors, the Board did not, and could not, consider less costly, less intrusive, or alternative methods because it is bound by the Court Order, which requires the Board to work in good faith toward adoption of these rule amendments.[39] While it is possible that the legislature could enact laws in the 2006 session that would have the same or similar effect as the proposed rules, it is the Board's legal obligation to comply with the Court Order in a timely manner.

30. The Board did not compute the probable costs of complying with the proposed rule amendments under the fifth regulatory factor because, as stated previously, the Board does not anticipate that any of the affected classes of people will incur any costs as a consequence of the adoption of the proposed rule amendments.[40]

31. The Board's analysis under the sixth regulatory factor is that if the proposed rule amendments are not adopted, the majority of the probable costs or consequences would fall upon the Board because the Plaintiffs in the Court Order litigation will likely ask the county district court to lift the stay on those proceedings and ask for sanctions to be imposed on the Board for noncompliance with the Court Order.[41] In all likelihood the Plaintiffs would also seek to recover their costs and attorney fees. In addition, if the proposed amendments were not adopted, the Court Order would still have the effect of enjoining the Board from enforcing cosmetology laws against hair braiders and hair braiding establishments. But the hair braiders would not have

[38] *Id.* at 5-6.
[39] *Id.* at 6.
[40] *Id.*
[41] *Id.*

achieved "codification" of the principles of the *Cornwell* decision as part of the regulatory policy of the State of Minnesota.[42]

32. The Board is not aware of any existing federal regulations applicable to the barbering and cosmetology professions.[43]

Performance-Based Regulation:

33. Minn. Stat. § 14.131, requires that an agency include in its SONAR a description of how it "considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002." Section 14.002 states, in relevant part, that "whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals."

34. The Board states that the rules as proposed are performance-based because they eliminate hair braiders and hair braiding establishments from the Board's regulatory jurisdiction, as required by the Court Order, and thereby, eliminate a questionable area of State regulation.[44] The Board also reiterates that failure to follow the mandate of the Court Order would possibly expose the Board to increased legal costs.

Consultation with the Commissioner of Finance:

35. Under Minn. Stat. § 14.131, the Agency is also required to "consult with the commissioner of finance to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government."

36. The Agency sent a draft of the proposed rules and the SONAR to its Department of Finance representative on November 17, 2005. The Agency predicted that the proposed rules would have no fiscal impact on units of local government because the rules would not require local government to take any action or incur any expenses.[45] The Department of Finance responded via letter dated November 22, 2005.

37. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems.

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[42] SONAR, pp. 6-7.
[43] *Id.* at 7.
[44] *Id.*
[45] *Id.* at 8.

Analysis Under Minn. Stat. § 14.127

38. Effective July 1, 2005, under Minn. Stat. § 14.127, all agencies must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees."[46] The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[47]

39. The Board has determined that the cost of complying with the proposed rules in the first year after they take effect will not exceed $25,000 for any small business or small city.[48] The Board made this determination based on the probable costs of complying with the proposed rules as discussed in the previous regulatory factors.

40. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.127 and approves the Agency's determination that the proposed rule, in the first year after the rule takes effect, will not exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.

41. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined, and it will not discuss each comment or rule part. Persons or groups who do not find their particular comments referenced in this Report should know that each and every suggestion, including those made prior to the hearing, has been carefully read and considered.

42. The Administrative Law Judge finds that the Board has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by statute and there are no other problems that would prevent the adoption of the rules.

Rule Subject Analysis

Modification of the definitions of barbering and cosmetology to exclude hair braiding, hair braiding services, and hair braiders

43. The Board proposes to amend the definition of "barbering" (Minn. R. 2100.0100, subp. 1a), "licensed services" (Minn. R. 2105.0010, subp. 11, and 2110.0010, subp. 18), and "unregulated service" (Minn. R. 2105.0010, subp. 13 and 2110.0010, subp. 20) to not prohibit or regulate hair braiding (Minn. R. 2100.0100, subp.

[46] Minn. Stat. § 14.127, subd. 1 (2005).
[47] Minn. Stat. § 14.127, subd. 2.
[48] SONAR, p. 9.

4, 2105.0010, subp. 10a, and 2110.0010, subp. 17a), hair braiding services (Minn. R. 2100.0100, subp. 5, 2105.0010, subp. 10b, and 2110.0010, subp. 17b), and hair braiders (Minn. R. 2100.0100, subp. 6, 2105.0010, subp. 10c, and 2110.0010, subp. 17c). The language of each of these amendments is based upon and set out, in some instances verbatim, in the Court Order.

44. The Board proposes the following definition for "hair braiding" as an unregulated service:

> "Hair braiding" means a natural form of hair manipulation that results in tension on hair strands by beading, braiding, cornrowing, extending, lacing, locking, sewing, twisting, weaving, or wrapping human hair, natural fibers, synthetic fibers, and/or hair extensions into a variety of shapes, patterns, and textures (predominantly by hand and/or simple braiding devices), and maintenance thereof. Hair braiding includes what is commonly known as "African-style hair braiding" or "natural hair care" but is not limited to any particular cultural, ethnic, racial, or religious form of hair styles. Hair braiding includes the making of customized wigs from natural hair, natural fibers, synthetic fibers, and/or hair extensions. Hair braiding includes the use of topical agents such as conditioners, gels, moisturizers, oils, pomades, and shampoos. Hair braiding does not involve the use of penetrating chemical hair treatments, chemical hair coloring agents, chemical hair straightening agents, chemical hair joining agents, permanent wave styles, or chemical hair bleaching agents applied to growing human hair.

45. The following are defined as "simple braiding devices" in the proposed rule amendments: clips, combs, curlers, curling irons, hairpins, rollers, scissors, needles, and thread.[49]

46. A small number of people present at the hearing supported the proposed rule amendments. Attorneys Lee McGrath and Nick Dranias of the Institute for Justice, the public interest litigation firm that initiated the *Cornwell* and *Anderson* cases, argued in favor of hair braiding as a natural hair care process not requiring 1500 hours of cosmetology training.[50] They argued that extensive cosmetology training is a barrier to competition and wage-making for hair braiders and that the proposed amendments are the least expensive way to ensure economic freedom for hair braiders in Minnesota. Mr. Dranias stressed that the *Cornwell* and *Anderson* lawsuits were based on constitutional issues and not regulatory issues.

47. Hair braiders Lillian Anderson and Gigi Asres and hair braider and licensed cosmetologist Mary Reed argued that no chemicals are used in the hair braiding process and that hair braiding truly is a separate and distinct industry from

[49] *See* Minn. R. 2100.0100, subp. 7; 2105.0010, subp. 11a; and 2110.0010, subp. 18a.
[50] Transcript ("Tr.") 35-41, 44-45.

cosmetology.[51] Ms. Reed explained that braiders have classes and workshops that they can attend to educate themselves and improve their skills, much as cosmetologists do.

48. The primary concern voiced by the public was that of the possible negative health and sanitation consequences of deregulating hair braiders. Jim Hirst, a lobbyist with the National Cosmetology Association of Minnesota ("NCAM"), suggested that hair braiders should have basic knowledge about health and safety and Minnesota cosmetology law, and he further proposed that hair braiders be required to take an 80-hour course prior to performing hair braiding services for the public.[52] Mr. Hirst asserted that Minnesota cosmetology schools are currently equipped to modify their curricula to incorporate such reduced training for hair braiders. Upon completion of a reduced educational curriculum, Mr. Hirst suggested that hair braiders be required to register with the State instead of becoming licensed.[53] A large number of persons who submitted written comments to the Board prior to the hearing were aware of this suggestion regarding registration and advocated in favor of it.[54]

49. In a written comment to the Board prior to the hearing, NCAM proposed a 40-hour training program dedicated to health and safety issues that the local cosmetology schools could provide for hair braiders. NCAM recommended the following content from current textbooks: Definitions (Minn. R. 2642.0010), examination administration (2642.0130), physical requirements (2642.0360), fixtures, furniture, and equipment (2642.0370), operational requirements for salons (2642.0380), salon supervision (2642.0390), specific types of salon licenses (2642.0400), certificate of identification (2642.0450), intoxicants and controlled substances (2642.0510), an overview of Minnesota Statutes, chapters 45 and 155A, and accepted classroom instruction about diseases and anatomy.[55] Following completion of such a training program, NCAM suggested that registration, as opposed to licensure, would be an appropriate way for the State to monitor hair braiders.

50. Thom Costa, a teacher of cosmetology at Century College, also expressed concern about health and sanitation issues if hair braiders are completely deregulated.[56] He spoke in detail about the cosmetology curriculum and the complexities of sanitation and disease issues. Mr. Costa further suggested that any negative publicity about untrained or unsanitary hair braiders would directly affect the reputation of the

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[51] Tr. 48-49, 53-58.

[52] Tr. 20-21. Mr. Hirst testified that the Minnesota cosmetology schools that he surveyed agreed about the need for an educational requirement for hair braiders in the range of 50 to 120 hours, and he reached his suggestion of 80 hours by averaging the range of suggested hours. Tr. 22-23.

[53] Tr. 21. This legislative session a bill was introduced in the Minnesota Senate (S.F. No. 3104) that requires any person engaged in hair braiding for compensation to complete instruction at an accredited school that includes coursework covering the topics of health, safety, sanitation, and state laws related to cosmetology. The status of the bill is pending as of the date of this Report.

[54] Ex. H (G. Edwin Holmvig-Johnson, Bella Housen, Babette Newman, Lindsay Cooley, Susan Kronmiller, and many others).

[55] Ex. H (NCAM letter dated February 9, 2006).

[56] Tr. 25-30, 78-81.

cosmetology industry because the average person would not understand that cosmetology and hair braiding are considered to be two separate occupations.[57]

51. In a written comment to the Board, licensed cosmetology instructor Joni Blekestad Krajewski wrote about the complex education that students receive in cosmetology school regarding bacteria, infections, contagious diseases, and blood borne pathogens, how to deal with clients who have a disease and how to prevent the spread of disease within the salon.[58]

52. Miguel Newman, who has been employed in the cosmetology industry since 1973, stated that the Board is buckling under pressure from the California and Minnesota lawsuits, the legislature, and other states' laws.[59] He failed to see the necessity of the Board regulating cosmetology and barbering if the Board would not regulate hair braiding.

53. Many of the cosmetology students who testified worried that a hair braider's use of the types of "simple braiding devices" listed in the proposed rules, such as a scissors, clips, combs, curling irons and rollers, would inevitably lead to the practice of cosmetology.[60]

54. The Board considered all of the written comments and testimony at the hearing and stated that it will not amend the proposed rules, based upon the language and mandate of the Court Order.[61] In addition, the Board believes that the proposed rules are consistent with the criteria for regulation under Minn. Stat. §§ 214.001 and 214.002.

55. The Board reiterated that it has no authority to create or implement any of the alternate means of regulation of hair braiders that were suggested by some of the comments and testimony. The Board only has authority to do what the legislature allows, and Board panel members suggested that individuals dissatisfied with the amended rules address the issue directly with their legislators. The panel did note that it has recently hired new inspectors and that it hopes to monitor hair salons and barber shops more closely in the future.

56. The Board also noted that the testimony regarding the possible negative effect on the cosmetology industry and the chance that hair braiders would engage in cosmetology practices is speculative and is not a sufficient basis upon which to alter the proposed rules.[62] The Board assured the concerned individuals that the Board would actively pursue any complaint about a hair braider engaging in cosmetology services,

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[57] Tr. 26.

[58] Ex. H (Krajewski letter dated January 30, 2006).

[59] Tr. 31-35.

[60] Tr. 39-40 (Katie Rote), 64 (Christina Anderson), 67-69 (Robert Davis), 71 (Melanie Hagedorn), 72-73 (Bethany Boeck).

[61] Ex. N, p. 3.

[62] Ex. N, p. 5.

and that such a complaint would be handled according to the procedures required by law.

57. None of the hair braiders who testified at the hearing objected to attending a sanitation and safety course for hair braiders. All three women agreed that hair braiders should obtain a basic understanding of sanitation and health safety prior to offering hair braiding services to the public. Mary Reed specifically suggested that 8 to 15 hours of such training would be appropriate.[63]

58. The Administrative Law Judge concludes that the Board has demonstrated a rational basis for the proposed changes, which are consistent with the terms of the Court Order and address the constitutional issues raised by Minnesota statutes and rules. It is not within the jurisdiction of the Administrative Law Judge to require the Board to adopt a training program for hair braiders. Such action must be pursued through the legislature.

Preemption of Local Ordinances that Prohibit or Regulate Hair Braiding, Hair Braiding Services, or Hair Braiders

59. The Board proposes to add language to rule parts 2100.0100, subp. 1a, 2105.0010, subp. 13, and 2110.0010, subp. 20 that preempts or prohibits local units of government from enacting ordinances that prohibit or regulate any matter relating to the licensing, testing, or training of hair braiding, hair braiding services, or hair braiders. The proposed language is dictated by the Court Order.

60. Few of the written comments or testimony directly address this issue. Jim Hirst of NCAM stated that the Association did not oppose the preemption language as long as there was a strong state standard on health and safety.[64]

61. At the hearing, the Board stated that this preemption provision does not excuse hair braiders and hair braiding establishments from performing their services in a healthy and sanitary way. Board member Kirkpatrick explained that some local ordinances may have stricter sanitation standards than those enforced by the Board and that the proposed rule language in no way preempts the enforcement against hair braiders of local ordinances that deal exclusively with health and safety.[65]

62. The Administrative Law Judge concludes that the Board has demonstrated a rational basis for the proposed changes, which are consistent with the terms of the Court Order and address the constitutional issues raised by Minnesota statutes and rules.

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[63] Tr. 61. *See also* Ex. H (April Robinson, Rachel Windschitl).
[64] Tr. 21.
[65] Ex. N, p. 3.

Modification of the Cosmetology Curriculum to Allow One Percent Time for the Teaching of Unregulated Services

63. The Board seeks to add language to rule parts 2110.0100, subp. 2, 2110.0500, and 2110.0680 that will permit cosmetology schools to grant educational credit for instructional time and clinical experience in unregulated services, such as hair braiding.[66] However, no more than one percent of the total curriculum time may be dedicated to the teaching of unregulated services. This language was not mandated by the Court Order, but the Board sought to include the language after receiving input from local cosmetology schools and instructors who wanted to continue teaching hair braiding in the cosmetology programs and continue to allow some amount of academic credit toward licensure requirements for such instruction.[67] Prior to the proposed amendments, cosmetology students received no credit for the teaching of unregulated services.

64. Several individuals commented that one percent of the 1500 hour curriculum, or 15 hours, was not a sufficient amount of time to teach hair braiding skills and allow the students to master those skills.[68] Jeri Pieper, a cosmetology instructor, indicated that it could take hundreds of hours for a student to become proficient in hair braiding, and that the student should get credit for more than 15 hours of that instruction and experience.[69] Ms. Pieper noted further that she, as an instructor, would have a difficult time tracking when a student has reached the 15 hour limit of instruction in unregulated services.

65. Upon review of the written comments and testimony, the Board did not agree to make changes to these amendments. The Board states again that the 1% allowance for instruction in unregulated services was not required by the Court Order and was added as a courtesy to cosmetology instructors who told the Board they wished to continue providing some amount of instruction in hair braiding for which students could get credit. The Board explained that the information received from local cosmetology schools about the amount of time spent teaching hair braiding caused the Board to conclude that 1% of the curriculum hours would amply cover the amount of instruction currently being provided by most schools.[70]

66. The Board first responds to the comments that 15 hours is not sufficient time for a cosmetology student to master hair braiding by arguing that the basic cosmetology school curriculum is meant to be a starting point in the fundamentals of multiple cosmetology skills, some of which will be mastered after graduation according to the specialized interests of each student.[71] In response to Ms. Pieper's comments about students needing several hundred hours of hair braiding instruction and

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[66] SONAR, p. 10.
[67] SONAR, p. 10; Ex. N, pp. 6-7.
[68] Tr. 59 (Anna Zust), 63-64 (Christina Anderson), 90-91 (Jeri Pieper).
[69] Tr. 90-91. *See also* Ex. H (Janet Thomsen).
[70] Ex. N, p. 7.
[71] Ex. N, p. 7.

experience to master the skill, the Board replied that such an emphasis on hair braiding would not allow the cosmetology schools to produce students well-versed in the fundamentals of hair cutting, styling, coloring, and perms. Finally, the Board does not believe that Ms. Pieper's comments about the difficulty of keeping track of the number of hours of instruction in unregulated services rises to such a level as to justify the withdrawal of these rule amendments.

67. The Administrative Law Judge concludes that Agency has the discretion to make the change reflected in the proposed rule, has made the change based on input from the regulated parties, and has, therefore, demonstrated a rational basis for the change.

General Objections to this Rulemaking

68. Generally, several cosmetology students objected to this rulemaking as unfair in two ways. First, the students argued that it is unfair that they must spend the time and money, ranging from $5,000 to $10,000, to become licensed as a cosmetologist, while hair braiders can simply open a salon without a license or health and sanitation training, use tools typically used by cosmetologists, and provide services to the public for a fee.[72] A number of students expressed that, if the proposed rules go into effect, they should be reimbursed the money they spent on tuition. Second, the cosmetology students suggest that hair braiders and hair braiding establishments will steal business from the cosmetology salons.[73]

69. In its response, the Board notes that the proposed rules do not restrict the practice of hair braiding to hair braiders and that licensed cosmetologists are free to perform hair braiding services on their clients. As a final point, the Board noted that, according to its knowledge and information about the cosmetology industry, braiding generally accounts for a very small percentage of the services offered in most cosmetology salons.[74] The concerned individuals could offer no concrete evidence that the proposed rules would take braiding business away from cosmetology salons, and the Board argued that the skill and ability of the hair braider, whether a licensed cosmetologist or not, would be the determining factor in how customers choose which type of hair braider to service their hair.

70. The Administrative Law Judge concludes that the Agency is acting within the parameters of the Court Order and its Agency discretion generally throughout this rulemaking. The Board has demonstrated a rational basis for the rule amendments.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

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[72] Tr. 41 (Katie Rote), 64 and 75 (Christina Anderson), 68-69 (Robert Davis), 71-72 (Melanie Hagedorn), 81-82 (Dani Omtvedt). *See also* Ex. H (Amy Krenik, Meredith Darge).

[73] Tr. 64 (Christina Anderson), 68-69 (Robert Davis). *See also* Ex. H (Jan Roelofs, Michelle Karis).

[74] Ex. N, p. 5.

CONCLUSIONS

1. The Board of Barber and Cosmetologist Examiners gave proper notice in this matter.

2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

4. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2; and 14.50 (iii).

5. Any Findings that might properly be termed Conclusions and any Conclusions that might properly be termed Findings are hereby adopted as such.

6. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Board from modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules, as published in the *State Register* on January 17, 2006, be adopted.

Dated this 13th day of April, 2006.

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

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